IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 3841 OF 2004

PRAKASHMAL HIRALAL KOTHARI .. PETITIONER

Vs.

GOVIND FAKIRRAO BAGUL .. RESPONDENT

Ms. V.S. Mhaispurkar for D.S., Mhaispurkar for petitioner

Mr. F.N. Kazi with Niyaz Ahmed for respondent

CORAM:-SMT. RANJANA DESAI, J.

DATED:-11/4/2005

P.C.

The petitioner is the original defendant. Respondent-plaintiff landlord filed a suit in the Court of Joint Civil Judge, Junior Division, Kalyan being Regular Civil Suit No. 43 of 1995 inter alia on the ground that the defendant was a defaulter. It was the contention of the plaintiff that the defendant has not paid arrears of rent. The trial court decreed the suit and held that the defendant was a defaulter.

2. In appeal carried from the said judgment and decree, the lower appellate court confirmed the finding of fact recorded by the trial court and hence this writ petition.

3. I have heard at considerable length the learned counsel appearing for the petitioner. The learned counsel submitted that admittedly the defendant had given construction loan of about Rs.22,600/- to the plaintiff. It was agreed between the plaintiff and the defendant that out of rent amount of Rs.108/- Rs.54/ were to be adjusted towards construction loan and the rest of the amount was to be paid to the plaintiff as the rent. According to the defendant, the defendant paid rent by money order. However, the plaintiff refused to accept the rent. The plaintiff issued first notice dated 12/10/93. Thereafter again the defendant sent money order, however the plaintiff refused to accept the money. The plaintiff then issued another notice dated 11/8/94 and thereafter the present suit came to be filed. The learned counsel contended that both the courts have erred in not noticing a very important aspect of the matter. She submitted that the notice dated 11/8/94 has not been proved by the plaintiff. She drew my attention to the deposition of the plaintiff and contended that he has only referred to the earlier notice dated 12/10/93 but has not referred to notice dated 11/8/94. She relied on the judgment of this court in **Atmaram Anant Kowli v. Maniram Narayan Raut & Ors., 1986 Maharashtra Rent**

Control Journal, Page 500 and contended that if the landlord fails to prove the service of notice then the decree of eviction cannot be sustained.

4. In my opinion, the said judgment cannot be applied to the facts of this case. In this case the plaintiff has replied to the notice dated 11/8/94. He has thus not disputed the receipt thereof. Hence the above judgment will not be applicable to the present case. So far as the non-payment of arrears of rent is concerned, the concurrent finding of fact is unassailable and in my opinion, cannot be disturbed in the writ jurisdiction. Hence the petition is rejected.
5. It appears that some amount of construction loan has not been repaid by the plaintiff to the defenant. The learned counsel for the plaintiff states that the remaining amount will be paid by the plaintiff to the defendant.
6. At this stage the learned counsel for the petitioner-defendant states that some time may be given to the defendant to vacate the suit premises. She asks for one years' time. The learned counsel for the respondent objects. In the circumstances of the case, the defendant is granted four months' time to vacate the suit premises on the defendant and every adult member of his family filing the usual undertakings in this court within a period of two weeks from today.
7. Certified copy expedited.

.....